INDEX

	PAGE
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statute Involved	4
Statement	4
Specification of Errors to be Urged	11
Reasons for Granting the Writ	12
Conclusion	24
Appendix	25

TABLE OF CASES

Amick v. Columbia Casualty Co., 101 F. 2d 984 (C. A. 8)	14
April v. April, 272 N. Y. 331	22
Ayers v. Lawrence, 59 N. Y. 192	17
Baker v. Allen, 292 Mass. 169	19
Benton v. Safe Deposit Bank of Pottsville Pa., 255 N. Y. 260	19
Board of Trade of City of Chicago v. Weston, 243 Fed. 332 (C. A. 7)	19
Boesenberg v. Chicago T. & T. Co., 128 F. 2d 245 (C. A. 7)	17
Bouve v. Cottle, 143 Mass. 310	19
Brooklyn Trust Co. v. Kelby, 134 F. 2d 105 (C. A. 2), cert. den., 319 U. S. 767	5, 6, 16, 18, 19
Browning v. Fidelity Trust Co., 250 Fed. 321 (C. A. 3), cert. den., 248 U. S. 564	22
Central Hanover B. & T. Co. v. President & Directors of the Manhattan Co., 105 F. 2d 130 (C. A. 2)	5, 6, 16

PAGE

Cherry v. Howell, 66 F. 2d 713 (C. A. 2) 17

Citizens Banking Co. v. Monticello State Bank, 143 F. 2d 261 (C. A. 8) 17, 22

Clarke v. Chase Bank, 137 F. 2d 797 (C. A. 2) 23

Cohen v. United States Securities Corp., 311 Mass. 152 19

Conover v. Guarantee Trust Co., 88 N. J. Eq. 450, aff'd, 89 N. J. Eq. 584 22

Dabney v. Chase Bank, 196 F. 2d 668 (C. A. 2) 24

Digney v. Blanchard, 226 Mass. 335 22

Dunning v. Bates, 186 Mass. 123 19

Eddy v. Kelsey, 148 F. 2d 323 (C. A. 2) 6

Enoch v. Brandon, 249 N. Y. 263 21

Erie R. Co. v. Tompkins, 304 U. S. 64 ..... 3, 12, 18, 19

Farm Bureau Mut. Automobile Ins. Co. v. Daniel, 92 F. 2d 838 (C. A. 4) 14

First Nat. Ins. Co. v. Salisbury, 130 Mass. 303 19

Greer Investment Co. v. Booth, 62 F. 2d 321 (C. A. 10) 17

Guaranty Trust Co. v. York, 326 U. S. 99 19

Hallett v. Moore, 282 Mass. 380 19

Harvey v. Guaranty Trust Co., 134 Misc. 417, aff'd, 229 App. Div. 774, 256 N. Y. 526 21

Hatch v. Morosco Holding Co., 50 F. 2d 138 (C. A. 2) 14

Hazzard v. Chase Bank, 159 Misc. 57, aff'd, 257 App. Div. 950, 283 N. Y. 682, cert. den., 311 U. S. 708 ..... 21, 22

Helvering v. Gregory, 69 F. 2d 809 (C. A. 2), aff'd, 293 U. S. 465 23

PAGE

Herzberg's Inc. v. Ocean Acc. & Guarantee Corp., 132 F. 2d 438 (C. A. 8) 14

Holmberg v. Armbrecht, 327 U. S. 392 19

Hudson v. Newell, 172 F. 2d 848 (C. A. 5) 14

Ironite Co. v. Guarantee Waterproofing Co., 64 F. 2d 608 (C. A. 8) 14

Isenberg v. Trent Trust Co., 31 F. 2d 553 (C. A. 9), cert. den., 279 U. S. 862 17

Kitchen Bros. Hotel Co. v. Omaha Safe Deposit Co., 126 Neb. 744 22

Klaxon Co. v. Stentor Co., 313 U. S. 487 19

Levinson v. Deupree, ... U. S. ....., 73 S. Ct. 914 19

Liberty Title & Trust Co. v. Plews, 142 N. J. Eq. 493 22

Litchfield v. White, 7 N. Y. 438 21

Manufacturers Trust Co. v. Kelby, 125 F. 2d 650 (C. A. 2), cert. den., 316 U. S. 697 ..... 5, 6, 16, 23

Marion Mortgage Co. v. Edmunds, 64 F. 2d 248 (C. A. 5) 17

May v. Le Claire, 11 Wall. 217 17

McDonald v. Smalley, 1 Pet. 620 ..... 13, 14

Milbank v. Littlefield, 310 Mass. 55 19

Mogul v. Jenkins Bros., 203 Misc. (N. Y.) 635 19

Moonblatt v. Kosmin, 139 F. 2d 412 (C. A. 3) 14

O'Beirne v. Bullis, 80 Hun 570, aff'd sub nom., O'Beirne v. Allegheny & Kinzua R. R. Co., 151 N. Y. 372 17

O'Beirne v. Bullis, 2 App. Div. 545, aff'd, 158 N. Y. 466 17

Okla. Gas Co. v. Russell, 261 U. S. 290 14

PAGE

O'Leary v. Brown-Pacific-Maxon, 340 U. S. 504 14

Peterson v. Hopson, 306 Mass. 597 ..... 17, 19

Pike's Peak Hydro-Electric Co. v. Power & Mining Machinery Co., 165 Fed. 184 (C. A. 8) 14

Pingree v. Comstock, 18 Pick. (35 Mass.) 46 19

President & Directors of the Manhattan Co. v. Kelby, 147 F. 2d 465 (C. A. 2), cert. den., 324 U. S. 866 ..... 5, 6, 16

Prudence Co. v. Central Hanover, 237 App. Div. 595, aff'd, 261 N. Y. 420 21

Prudence Corp. v. Geist, 316 U. S. 89 19

Purcell v. Summers, 126 F. 2d 390 (C. A. 4) 14

Rae v. Meek, 14 App. Cas. 558 22

Redmond v. Commerce Trust Co., 144 F. 2d 140 (C. A. 8), cert. den., 323 U. S. 776 17

Rothschild v. Rio Grande Western R. Co., 84 Hun 103, 17 App. Div. 635, aff'd, 164 N. Y. 594 21

Seelig v. First Nat. Bank of Chicago, 20 F. Supp. 61 (D. C. N. D. Ill.) 22

Smith v. Continental Bank, 292 N. Y. 275 ..... 8, 9, 18, 19

Solar Mfg. Corp., In re, 200 F. 2d 327 (C. A. 3), cert. den., 345 U. S. 940 ..... 17, 18, 19

State v. Comer, 176 Wash. 257 22

State Street Trust Company v. Walker, 259 Mass. 578 ..... 17, 19

Stephenson v. Equitable Life Assur. Soc., 92 F. 2d 406 (C. A. 4) 13, 14

Sternberg v. Drainage Dist. No. 17, 44 F. 2d 560 (C. A. 8) 21

PAGE

Straus v. Chicago T. & T. Co., 273 Ill. App. 63 22

Thornton v. Carter, 109 F. 2d 316 (C. A. 8) 14

Tucker v. Dr. P. Phillips Co., 148 F. 2d 904 (C. A. 5) 13, 14

Tuttle v. Gilmore, 36 N. J. Eq. 617 22

Vanston Committee v. Green, 329 U. S. 156 19

V-I-D, Inc., In re, 198 F. 2d 392 (C. A. 7), cert. den., 344 U. S. 914 19

Wragg v. Federal Land Bank of Orleans, 317 U. S. 325 19

Wright v. Central Ins. Co., 304 U. S. 502 19

Young v. Haviland, 215 Mass. 120 19

STATUTES

Bankruptcy Act:

Sec. 24(a), 11 U. S. C. Sec. 47(a) 13, 25

Sec. 24(c), 11 U. S. C. Sec. 47(c) 2

Sec. 77B(b), (9), 11 U. S. C. Sec. 207(b), (9) 25

Sec. 77B(h), 11 U. S. C. Sec. 207(h) 25

Sec. 212, 11 U. S. C. Sec. 612 26

Sec. 216(10), 11 U. S. C. Sec. 616(10) 27

Sec. 227, 11 U. S. C. Sec. 627 27

Judicial Code (Old):

28 U. S. C. Sec. 41(19) 19

28 U. S. C. Sec. 371(6) 19

PAGE

Judiciary and Judicial Procedure Act:

28 U S. C. Sec. 1254 2

28 U. S. C. Sec. 1334 19

McKinney's Consolidated Laws of New York, Book 40, Sec. 41 ..... 18, 19

New York Personal Property Law, Sec. 41 18

Trust Indenture Act of 1939, 15 U. S. C. Sec. 77aaa et seq. 23

United States Code:

11 U. S. C. Sec. 47(a) 13, 25

11 U. S. C. Sec. 47(c) 2

11 U. S. C. Sec. 207(b), (9) 25

11 U. S. C. Sec. 207(h) 25

11 U. S. C. Sec. 612 26

11 U. S. C. Sec. 616(10) 27

11 U. S. C. Sec. 627 27

15 U. S. C. Sec. 77aaa et seq. 23

28 U. S. C. former Sec. 41(19) 19

28 U. S. C. former Sec. 371(6) 19

28 U. S. C. Sec. 1254 2

28 U. S. C. Sec. 1334 19

RULES

Federal Rules of Civil Procedure, Rule 53 14

General Order in Bankruptcy, No. 47 14

MISCELLANEOUS

PAGE

Beale on Conflict of Laws, Vol. 2, p. 1251 19

Hughes' Federal Practice, Vol. 17, Sec. 18514 19

Liability of the Trustee under the Corporate Indenture, 42 Harv. L. Rev. 198 22

New York Legislative Doc. 65(D), 1950 19

Restatement, Law of Trusts:

Sec. 174 21

Sec. 197(b) 17

Sec. 198(c) 17

Sec. 198(d) 17

Sec. 200 17

Sec. 222 ..... 21, 22

Right to Maintain Action for Breach of Trust after Transfer of Beneficial Interest, 59 Harv. L. Rev. 1286 19

Scott on Trusts, Vol. 2:

Sec. 222.2 21

Sec. 222.3 22

The Subsequent Bondholder and the Delinquent Trustee, 51 Col. L. Rev. 813 ..... 19, 22

The Trustee and the Trust Indenture, 46 Yale L. J. 737 22

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. .....

PRUDENCE-BONDS CORPORATION (NEW CORPORATION), SUCCESSOR TRUSTEE OF PRUDENCE-BONDS CORPORATION, DEBTOR, GEORGE E. EDDY AND ADA S. BEARDSLEY, PETITIONERS,

VS.

STATE STREET TRUST COMPANY, AS TRUSTEE OF PRUDENCE-BONDS, TENTH SERIES, UNDER TRUST AGREEMENT DATED MAY 1, 1927, WITH PRUDENCE-BONDS CORPORATION.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioners, Prudence-Bonds Corporation (New Corporation), the Successor Trustee of Prudence-Bonds Corporation, Debtor, George E. Eddy and Ada S. Beardsley, respectfully pray that a writ of certiorari issue to review the judgment or decree of the United States Court of Appeals for the Second Circuit entered March 3, 1953, affirming a decree of the United States District Court for the Eastern District of New York entered April 2, 1951, in proceedings for the reorganization of Prudence-Bonds Corporation, Debtor, under the Bankruptcy Act (R. 11, 1237).

Opinions Below

The majority and dissenting opinions of the Court of Appeals for the Second Circuit (R. 1197, 1212) are reported in 202 F. 2d 555, 558, 564.

The opinion of the District Court (R. 461) is reported in 101 F. Supp. 729.

The opinion of the Special Master is not reported but is printed in the record (R. 278).

Jurisdiction

The judgment or decree of the United States Court of Appeals for the Second Circuit was entered on March 3, 1953 (R. 1237). A petition for rehearing filed in that Court by petitioners (R. 1239) was denied on March 31, 1953 (R. 1266, 1268). By order of this Court entered May 26, 1953, the time for filing a petition for a writ of certiorari was extended to and including July 29, 1953 (R. 1271).

The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254, and Sec. 24(c) of the Bankruptcy Act, as amended, 11 U. S. C. Sec. 47(c).

Questions Presented

In a proceeding for reorganization of a corporation under the Bankruptcy Act an indenture trustee, in aid of carrying out a confirmed Plan of Reorganization, accounted to the bankruptcy court for its acts as trustee under a trust indenture creating a trust fund securing an issue of bonds of the Debtor. Objection was made to the account upon the ground that the indenture trustee caused the trust fund to suffer a substantial loss by a devastavit of nonfeasance in failing to protect and enforce a security constituting a major part of the trust *res*. The issue was

tried before a Master who sustained the objection and surcharged the indenture trustee $1,169,424.44, plus interest. The District Court, without passing upon the merits of the cause, dismissed the objection upon the ground that the bankruptcy court had no jurisdiction of the subject matter. The Court of Appeals first affirmed, holding that the bankruptcy court had no jurisdiction. On rehearing, the Court of Appeals vacated its judgment of affirmance, held that the bankruptcy court had jurisdiction and affirmed the decree upon the merits of the cause.

The questions are:

1. Whether on an appeal from a decree of a federal district court dismissing a bankruptcy cause for lack of jurisdiction, the Court of Appeals, upon deciding that the bankruptcy court had jurisdiction, is empowered to affirm the decree upon the merits of the cause not determined by the decree?

The following additional questions presented would not require consideration if this Court, on granting certiorari, should answer question No. "1" in the negative and remand the cause to the District Court to pass upon the merits.

2. Whether a bankruptcy court in a corporate reorganization proceeding has jurisdiction to enforce for the benefit of bondholder secured creditors as a class the liability of an indenture trustee for a devastavit of nonfeasance in failing to protect and enforce a security constituting part of a trust *res* securing an issue of bonds of the Debtor?

3. Whether the rule of *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, applies where the jurisdiction of the federal court is based upon the Bankruptcy Act and not upon diversity of citizenship?

4. Whether, if state law controls the bankruptcy court, the controlling law is that of the state where the bank-

ruptcy court sits, or the state where the trust indenture was executed and to be performed by the indenture trustee?

5. Whether a trust indenture provision giving complete immunity to a professional indenture trustee against liability for any nonfeasance with respect to a trust *res* securing a public issue of corporate bonds is ineffective and contrary to public policy?

6. Whether the majority of the Court of Appeals erred in construing the trust indenture to provide for complete immunity to the trustee against liability for any nonfeasance with respect to the trust *res*?

Statute Involved

The pertinent provisions of the Bankruptcy Act, as amended, are set forth in the Appendix, *infra*, pp. 25-27.

Statement

This case involves the reorganization of Prudence-Bonds Corporation, Debtor, under the Bankruptcy Act, and, more particularly, a summary proceeding had in the bankruptcy court, Eastern District of New York, for the judicial settlement of the account of State Street Trust Company of Boston, Massachusetts, trustee under a trust indenture with the Debtor securing a Series of the Debtor's bonds known as "Tenth Series" (R. 36-78).

When the Debtor, a New York corporation, filed its petition for reorganization it had outstanding 83,000 bonds of 18 Series aggregating $56,000,000.00, held by 30,000 persons residing in New York State and elsewhere throughout the United States and in foreign countries (R. 324). Each Series was secured by a trust fund, consisting of mortgages, cash and other securities, held by a Bank as trustee under a trust indenture with the Debtor (R. 320-321).

The Debtor was found to be insolvent and a Plan of Reorganization was confirmed which provided, in part, for a new corporation (also named Prudence-Bonds Corporation) to be owned by the bondholders, an extension of the maturity of the bonds and changes in interest provisions (R. 324-326). Eleven Banks were trustees of the 18 Series of bonds (R. 81-82). Under the Plan, one of the Banks became trustee of all Series under a supplemental trust indenture with the new Prudence-Bonds Corporation (R. 326-327).

Upon confirmation, jurisdiction was retained to carry out the Plan (R. 325). To that end the bankruptcy court, among other things, approved the appointment of the successor indenture trustee, approved the supplemental trust indenture, and directed the original indenture trustees to transfer the trust funds to the successor trustee and to account in the reorganization proceeding for their acts as trustees (R. 326-328).

Each of the indenture trustees submitted to the jurisdiction of the bankruptcy court, filed its account and petitioned for the judicial settlement thereof and a discharge from all liability (R. 328). The jurisdiction of the bankruptcy court over the accountings was upheld in *Central Hanover B. & T. Co.* v. *President & Directors of the Manhattan Co.*, 105 F. 2d 130 (C. A. 2). On the mandate of the Court of Appeals in that case, the bankruptcy court decreed that it had and thereby exercised "full complete and exclusive jurisdiction" to settle the accounts and to hear and determine "any and all objections thereto" (R. 81-82). Objections to the accounts were filed and there then ensued further litigation in the proceedings which resulted in three other decisions of the Court of Appeals reported as *Manufacturers Trust Co.* v. *Kelby*, 125 F. 2d 650 (C. A. 2), cert. den., 316 U. S. 697; *Brooklyn Trust Co.* v. *Kelby*, 134 F. 2d 105 (C. A. 2), cert. den., 319 U. S. 767, and *President & Directors of the Manhattan Co.* v. *Kelby*, 147 F. 2d 465 (C. A. 2), cert. den., 324 U. S. 866.

In both the *Manufacturers Trust Company* and the *Brooklyn Trust Company* cases the Court of Appeals reaffirmed its decision in the *Central Hanover* case that the bankruptcy court had jurisdiction. In the *President & Directors of the Manhattan Co.* case, the Court of Appeals upheld upon the merits a very substantial surcharge against that Bank which was trustee of two Series of the Debtor's bonds. In most other Series the objections were settled and compromised with the approval of the bankruptcy court (R. 1243-1244). In one case a settlement was upheld by the Court of Appeals (*Eddy* v. *Kelsey,* 148 F. 2d 323, C. A. 2). The recovery obtained in each case, whether by surcharge or settlement, became a part of the trust *res* securing the bonds and enured to the benefit of all bondholders of the Series. The final decree of the bankruptcy court in each of the other accountings judicially settled, as adjusted, the account of the indenture trustee and released it of all liability as trustee.

State Street Trust Company, the accounting trustee in the instant case, is a Massachusetts banking corporation with offices in Boston (R. 39). It became trustee of the Debtor's Tenth Series bonds under a trust indenture with the Debtor dated May 1, 1927 (R. 726). The trust was accepted and became effective when executed by the trustee in Boston (R. 767-769); the situs of the trust fund was the office of the Bank in Boston; the bonds secured by the trust fund were "not valid for any purpose until authenticated" by the indenture trustee; they were authenticated and delivered in Massachusetts, marketed through Estabrook & Co. of Boston and payable at the Boston office of Estabrook & Co. (R. 738, 740, 783, 1109).

State Street Trust Company, like the other indenture trustees, filed its account in the Debtor's reorganization proceeding in New York, and petitioned the bankruptcy court for a judicial settlement thereof and a discharge from all liability as trustee (R. 39, 43, 320, 329-330).

Objections to the account were duly filed by the new Prudence-Bonds Corporation and the Reorganization Trustees of the Debtor and were joined in by individual bondholders (R. 85, 330-331). The account and objections were referred to a Master to take testimony and to hear and report on the facts and the law with his opinion thereon (R. 278).

The main objection to the account, the objection here material, sought a surcharge against the indenture trustee for breach of trust in failing to protect and enforce a guarantee made by The Prudence Company, Inc. (an affiliate of the Debtor) to the indenture trustee, guaranteeing payment of principal and interest of all mortgages in the trust fund securing the Tenth Series bonds (R. 88-90, 296-310). At the trial it was established, and the Master found, that the trust indenture expressly provided for this guarantee, that the guarantee was executed by the Guarantor and duly delivered to the indenture trustee, that one of the mortgages constituting 85% of the entire trust *res* was, to the knowledge of the indenture trustee, in default at all times from May 28, 1929, that the mortgage was foreclosed and the mortgaged premises ultimately sold at a loss of $1,162,424.44, that the Guarantor, in February, 1935, went into bankruptcy reorganization and was found to be insolvent, and that the indenture trustee, although the legal and sole owner of the guarantee, did not at any time make any demand or claim or take any step or action to enforce the guarantee while the Guarantor was solvent or after the Guarantor went into reorganization (R. 296-310, 349-350, 355-366, 370-376).

The Master sustained the objection and surcharged State Street Trust Company in the sum of $1,169,526.74, plus interest (R. 388-389).

The District Court, without passing upon the merits of the objection, overruled the Master and dismissed the objection upon the grounds that the guarantee, although ex-

pressly provided for by the trust indenture, was not part of the trust *res*, and that a bankruptcy court, in a corporate reorganization proceeding, has no jurisdiction to surcharge an indenture trustee for a devastavit of nonfeasance (R. 469-472; 101 F. Supp. 729).

Petitioners, the Objectors to the account, appealed the decree of the District Court (Inch, J.) entered April 2, 1951 (R. 5, 16). Petitioners urged that the bankruptcy court had jurisdiction and that if the Court of Appeals reversed it should direct the entry of the judgment which the District Court ought to have granted. The indenture trustee took the position that it was not called upon to detail in its brief on the appeal various issues pertaining to the merits for the reason that they involved consideration of "complicated facts upon which the District Court declined to pass".

The Court of Appeals affirmed with an opinion, dated December 5, 1951, written by Judge Frank and concurred in by Chief Judge Swan and District Judge Coxe (R. 1112-1115; 202 F. 2d 556). The Court of Appeals, assuming that the guarantee was part of the trust *res*, held that the jurisdiction of the bankruptcy court was controlled by the law of New York regarding the nature of the liability of a trustee of a trust fund securing bonds; that in New York, particularly since *Smith* v. *Continental Bank* (1944), 292 N. Y. 275, the liability of such a trustee for a devastavit of misfeasance is to restore the lost trust *res* and is enforceable derivatively in the right of the trust for the benefit of all bondholders as a class, whereas, a devastavit of nonfeasance gives rise only to personal causes of action for damages in favor of the persons who owned the bonds at the time of the nonfeasance; that, accordingly, the bankruptcy court, while having jurisdiction in a case of misfeasance where the recovery goes to restore the *res*, has no

jurisdiction over the personal causes of action arising in the case of nonfeasance (202 F. 2d 556-557).

The Court of Appeals was of the opinion that the rule of *Smith* v. *Continental Bank, supra,* was unsound and peculiar to New York law, but held that it was controlled thereby (202 F. 2d 556-557); See footnote 8, *infra,* pp. 18-19).

Petitioners duly applied for rehearing and, in addition to contending that the Court of Appeals misinterpreted New York law, urged that state law does not control a bankruptcy court exercising, in a corporate reorganization proceeding, its express and inherent powers to enforce accountings under and to satisfy trust indentures; that, even if state law governed, the controlling state, on the facts of this case, would not be New York, where the bankruptcy court sits, but Massachusetts where the trust indenture was executed and to be performed by the indenture trustee; that Massachusetts decisions dealing with the liability of trustees for bondholders treated such a trustee the same as any other trustee and were contrary to the law of New York as construed by the Court of Appeals (R. 1119-1147).

The Court of Appeals granted rehearing and the appeal, originally heard by Chief Judge Swan, Judge Frank and District Judge Coxe, was reheard on oral argument and briefs, limited to the issue of jurisdiction, before Judges Swan, Learned Hand and Frank (R. 1112, 1125-1196, 1197).

On March 3, 1953, fifteen months after rendering its decision of December 5, 1951, the Court of Appeals, by a majority opinion of Judge Learned Hand, vacated its original judgment, held that the bankruptcy court had jurisdiction, but again affirmed the decree on appeal, this time upon grounds involving the merits of the cause which had not been passed upon by the District Court (R. 1197-1212; 202 F. 2d 558).

The majority of the Court of Appeals, avoiding any decision as to what law governed the issue of jurisdiction, decided, upon certain assumptions, that the bankruptcy court had jurisdiction sufficient to warrant the Court of Appeals considering the cause upon the merits, and, upon so doing, concluded that the intent of an ambiguous provision of the trust indenture was to give the indenture trustee complete immunity against liability for any nonfeasance with respect to the trust *res* (R. 1197-1212; 202 F. 2d 558).

The majority Judges relied upon their interpretation of the wording of Sec. 1 of Article V of the trust indenture (R. 1204, 1206; 202 F. 2d 561),[1] and resolved their stated speculations and admitted doubts about the meaning of such Section in favor of the indenture trustee (R. 1206-1211; 202 F. 2d 561-564). The majority opinion clearly indicates that the majority Judges believed that the indenture trustee had invoked such Section as an excuse (R. 1204; 202 F. 2d 561),[2] whereas, the indenture trustee, although represented in the Court of Appeals by the same attorneys who had represented it when the indenture was drafted and executed, did not in its brief in the Court of Appeals even mention, let alone invoke, Sec. 1 of Article V (R. 1253).

Judge Frank, who wrote the original unanimous opinion of the Court of Appeals, vigorously dissented holding that the Court's original decision on the issue of jurisdiction was entirely erroneous, that the bankruptcy court had full

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[1] The majority opinion, referring to another section of the indenture, states (R. 1205; 202 F. 2d 561):

> "* * * If this (the other) section stood alone, we might hesitate to say that it created an excuse. However, when read in conjunction with Sec. 1 of Article V, it confirms our conclusion, *depending upon that section,* that the Trustee meant to obtain a general immunity from any liability for nonfeasance." (Italics ours.)

[2] The majority opinion states: "The Trustee invokes three clauses of the Indenture to excuse its failure to enforce this Guaranty; * * * (3) § 1 of Article V" (R. 1204; 202 F. 2d 561).

jurisdiction, that the indenture trustee is liable to restore the loss to the trust *res* resulting from its nonfeasance, that the trust indenture does not contain any provision immunizing the trustee against such liability, that even if it did the provision would be ineffective and contrary to public policy, that the majority decision "debases" the word "trustee", is "without precedent" and "contrary to the precedents" (R. 1212, 1216, 1222, 1234; 202 F. 2d 564, 569, 575).

Specification of Errors to be Urged

The Court of Appeals erred:

1. In affirming the decree on appeal upon the merits of the cause which were not determined by the decree.

2. In not reversing the decree on appeal and remanding the cause to the District Court for determination upon the merits.

The following additional assignments of error relate to the questions presented other than question No. "1", and would not require consideration if such question were answered in the negative.

The Court of Appeals erred:

3. In holding that the jurisdiction of the bankruptcy court depended upon whether the bondholder secured creditors on the date the Debtor's petition for reorganization was filed included some at least who purchased their bonds before the date the indenture trustee's nonfeasance commenced.

4. In not holding that the liability of the indenture trustee for its devastavit of nonfeasance with respect to the trust *res* is to restore to the trust fund the value of the

lost trust property, that the right to enforce such liability constitutes property of the Debtor within the meaning of the Bankruptcy Act, and that the bankruptcy court, on the accounting by the indenture trustee, had full jurisdiction to enforce such liability for the benefit of the bondholder secured creditors as a class.

5. In not holding that the rule of *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, does not apply where the jurisdiction of the federal court is based upon the Bankruptcy Act.

6. In not holding that if state law controlled the bankruptcy court in determining the nature of the liability of the indenture trustee the controlling law, on the facts of this case, is the law of Massachusetts.

7. In construing the trust indenture to provide for complete immunity to the indenture trustee against liability for any nonfeasance with respect to the trust *res.*

8. In not holding that a trust indenture provision giving complete immunity to an indenture trustee for any nonfeasance with respect to a trust *res* securing a public issue of corporate bonds is ineffective and contrary to public policy.

9. In not reversing the decree on appeal and holding that the indenture trustee is liable for its devastavit of nonfeasance as recommended by the Report of the Master.

Reasons for Granting the Writ

1. The decision below presents an important question regarding the jurisdiction of United States Courts of Appeals which should be resolved by this Court. In deciding upon the merits a cause which the District Court did not decide upon the merits the Court of Appeals probably

exceeded its powers and determined the cause in a way probably in conflict with the provisions of the Bankruptcy Act and decisions of other Federal Courts of Appeals.

The Bankruptcy Act, Sec. 24(a), 11 U. S. C. Sec. 47(a), invests Courts of Appeals with "appellate jurisdiction • • • to review, affirm, revise, or reverse, both in matters of law and in matters of fact".

Where, as here, a court of bankruptcy has dismissed a cause for lack of jurisdiction, without passing upon the merits as a matter of fact or law, there is no judgment upon the merits to "review, affirm, revise, or reverse".

In *McDonald* v. *Smalley*, 1 Pet. 620, 621, where the record contained the whole of the proceedings and exhibited all matters required for a final disposition of the cause, this Court, when asked for instructions, and "having been advised upon the subject, directed counsel to argue the point of jurisdiction only, as no other than that had been decided in the court from which the appeal had been taken".

In *Tucker* v. *Dr. P. Phillips Co.*, 148 F. 2d 904 (C. A. 5), the Court stated, p. 907:

> "• • • Since the court below did not consider the merits of the counterclaims or any questions of set-off that may arise in connection therewith, the ultimate rights and liabilities of the sub-lessor and the trustee of the bankrupt may not be determined on this appeal. These are matters upon which the trial court must first rule."

In *Stephenson* v. *Equitable Life Assur. Soc.*, 92 F. 2d 406 (C. A. 4), the Court stated, p. 410:

> "• • • In reversing the dismissal on the jurisdictional point there is nothing that we can do but remand the cause for further proceedings. We have been urged to interpret the incontestable clause of the policy; but our powers are solely those of an appellate court, and we can pass upon the merits of a cause only by way of review."

There are many other cases in accord with this principle of appellate jurisdiction.[3]

Other cases hold that, except on appeals involving jury verdicts, a Court of Appeals is empowered, when it reverses a cause, to direct the entry of a proper judgment in the lower court and thus terminate the litigation upon the merits.[4]

The Court of Appeals in the instant case did not reverse the decree on appeal, nor did it direct any action by the District Court; it affirmed upon the merits of the cause, but in affirming reversed the decision of the District Court dismissing the cause for lack of jurisdiction (R. 1235, 1237). The Court of Appeals thus assumed original jurisdiction of the cause upon the merits; it did what this Court declined to do in *McDonald* v. *Smalley, supra;* what the *Tucker, Stephenson* and other cases cited *supra* hold Courts of Appeals are not empowered to do even when urged by parties.

Appeal does not lie from a report of a Special Master; the report must first be passed upon by the District Court.[5] The unusual result of the instant case is that the Master's Report, determining the cause upon the merits in favor of petitioners, has in effect been reversed in the

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[3] *Hudson* v. *Newell,* 172 F. 2d 848, 850 (C. A. 5); *Amick* v. *Columbia Casualty Co.,* 101 F. 2d 984 (C. A. 8); *Purcell* v. *Summers,* 126 F. 2d 390, 395-396 (C. A. 4); *Farm Bureau Mut. Automobile Ins. Co.* v. *Daniel,* 92 F. 2d 838, 839 (C. A. 4); *Ironite Co.* v. *Guarantee Waterproofing Co.,* 64 F. 2d 608, 609 (C. A. 8); *Hatch* v. *Morosco Holding Co.,* 50 F. 2d 138, 141 (C. A. 2); *Moonblatt* v. *Kosmin,* 139 F. 2d 412, 415 (C. A. 3); *Pike's Peak Hydro-Electric Co.* v. *Power & Mining Machinery Co.,* 165 Fed. 184 (C. A. 8); Cf., *Okla. Gas Co.* v. *Russell,* 261 U. S. 290; *O'Leary* v. *Brown-Pacific-Maxon,* 340 U. S. 504.

[4] *Thornton* v. *Carter,* 109 F. 2d 316, 319 (C. A. 8); *Herzberg's Inc.* v. *Ocean Acc. & Guarantee Corp.,* 132 F. 2d 438, 441 (C. A. 8).

[5] General Order in Bankruptcy 47; F. R. C. P. 53; *Moonblatt* v. *Kosmin,* 139 F. 2d 412 (C. A. 3).

Court of Appeals in favor of the indenture trustee on an appeal taken by petitioners.

This cause, involving issues of substantial importance to the investing public, as well as to the parties, has, therefore, been determined upon the merits without the due process of a determination upon the merits by a District Court.

The possibility of a miscarriage of justice inherent in the assumption of such power by Courts of Appeals is emphasized by this case. The cause has been determined in favor of the indenture trustee upon the merits; (a) without any decision thereon by the District Court; (b) by a tie vote of the Master and the three Judges of the Court of Appeals; (c) by a majority opinion of a Judge who sat only on the rehearing on the issue of jurisdiction; and (d) upon a point not relied upon by the indenture trustee in the Court of Appeals (Statement, *supra*, pp. 8-11).

2. The Court of Appeals has rendered a decision on an important question of jurisdiction of courts of bankruptcy in corporate reorganization proceedings probably in conflict with provisions of the Bankruptcy Act and decisions of Courts of Appeals for the Second and Third Circuits. The question is of importance in the administration of the Bankruptcy Act and effects a large segment of the investing public holding corporate bonds secured by trust indentures.

The Court of Appeals, reversing the District Court, has held that the bankruptcy court had jurisdiction of the instant cause. In so holding, however, the majority of the Court of Appeals has placed an untenable limitation upon the jurisdiction of courts of bankruptcy to enforce, in corporate reorganization proceedings, accountings under trust indentures securing bonds issued by corporations in reorganization. The majority has held, in substance, that the scope of the court's jurisdiction upon such accountings depends upon whether an indenture trustee's breach of trust is misfeasance or nonfeasance with respect to the trust *res*.

The Second Circuit Court of Appeals in four companion cases in this same reorganization proceeding unanimously held that the liability of an indenture trustee for a devastavit of misfeasance, such as a wrongful release or surrender of trust property, is to restore the trust *res*, that the right to enforce such liability is a right of the trust which follows the bonds, and that the bankruptcy court, upon an indenture trustee's accounting, has full jurisdiction to compel restoration of the trust *res* for the benefit of the bondholder secured creditors as a class irrespective of when they acquired their bonds (*Central Hanover B. & T. Co.* v. *President & Directors of the Manhattan Co.*, 105 F. 2d 130 (C. A. 2); *Manufacturers Trust Co.* v. *Kelby*, 125 F. 2d 650 (C. A. 2), cert. den., 316 U. S. 697; *Brooklyn Trust Co.* v. *Kelby*, 134 F. 2d 105 (C. A. 2), cert. den., 319 U. S. 767; *President & Directors of the Manhattan Co.* v. *Kelby*, 147 F. 2d 465 (C. A. 2), cert. den., 324 U. S. 866).

In the instant case, involving a substantially identical trust indenture, the majority of the Court of Appeals has held that where the indenture trustee's devastavit is nonfeasance with respect to the trust *res*, the bankruptcy court has jurisdiction if the bondholder secured creditors on the date the petition for reorganization was filed included "some at least" who bought their bonds before the date the indenture trustee's nonfeasance commenced (R. 1202; 202 F. 2d 560).[6]

[6] Petitioners interpret the majority decision to mean that the requirement that there be some such bondholders when the Debtor's petition for reorganization was filed qualifies or limits the jurisdiction of the bankruptcy court, but does not qualify or limit the liability of the indenture trustee; that the liability is to restore the *res* and is measurable, as in a case of misfeasance, by the amount of the loss sustained by the trust fund. This interpretation is implicit from the majority holding that the bankruptcy court had jurisdiction. If the indenture trustee's liability for a devastavit of nonfeasance gave rise to personal causes of action for damages in favor only of persons who owned bonds at the time of nonfeasance, the bankruptcy court, obviously, would have no jurisdiction over such personal causes having nothing to do with the *res* in *custodia legis*.

The decision of the Court of Appeals on the issue of jurisdiction is, therefore, in conflict with the four earlier decisions of the same Court of Appeals in the same reorganization proceeding. The instant case is in all respects basicly the same as the earlier cases. The only factual difference relied upon by the majority of the Court of Appeals is that the instant case involves nonfeasance of the indenture trustee, whereas, the earlier cases involved misfeasance.

The only ground stated by the majority for this distinction is that a trustee who loses part of the trust *res* by inaction or neglect does not "release or surrender" the lost trust property (R. 1200; 202 F. 2d 559). This is an artificial distinction without a difference. A trustee's "devastavit * * * may consist of any act or omission, every mismanagement, by which the estate suffers loss" (*Ayers* v. *Lawrence,* 59 N. Y. 192, 197). There is no logical distinction between an affirmative or negative, active or quiescent, release or surrender of trust assets. A trust *res* can be given up or lost as effectively by inaction as by action. In either case it is the trust estate which suffers the loss; in either case the recovery goes to restore or replenish the trust estate under the jurisdiction of the bankruptcy court.[7]

The decision of the Court of Appeals on the issue of jurisdiction is squarely in conflict with *In re Solar Mfg.*

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[7] See *May* v. *Le Claire,* 11 Wall, 217; *Isenberg* v. *Trent Trust Co.,* 31 F. 2d 553 (C. A. 9), cert. den., 279 U. S. 862; *Cherry* v. *Howell,* 66 F. 2d 713 (C. A. 2); *Marion Mortgage Co.* v. *Edmunds,* 64 F. 2d 248 (C. A. 5); *Greer Investment Co.* v. *Booth,* 62 F. 2d 321 (C. A. 10); *Boesenberg* v. *Chicago T. & T. Co.,* 128 F. 2d 245 (C. A. 7); *Citizens Banking Co.* v. *Monticello State Bank,* 143 F. 2d 261 (C. A. 8); *Redmond* v. *Commerce Trust Co.,* 144 F. 2d 140 (C. A. 8), cert. den., 323 U. S. 776; *Peterson* v. *Hopson,* 306 Mass. 597; *State Street Trust Company* v. *Walker,* 259 Mass. 578; *O'Beirne* v. *Bullis,* 80 Hun 570, aff'd sub nom., *O'Beirne* v. *Allegheny & Kinzua R. R. Co.,* 151 N. Y. 372, same case on second trial, *O'Beirne* v. *Bullis,* 2 App. Div. 545, aff'd, 158 N. Y. 466; Restatement, Law of Trusts, Secs. 197(b), 198(c), 198(d), 200.

Corp., 200 F. 2d 327 (C. A. 3), cert. den., 345 U. S. 940, where the Third Circuit Court of Appeals upheld, without qualification, the jurisdiction of the bankruptcy court to enforce, for the benefit of bondholder creditors as a class, an accounting by an indenture trustee for a devastavit of nonfeasance and rejected a contention that the right to recover for the devastavit was personal to the bondholders.

The Second Circuit Court of Appeals in the *Brooklyn Trust Company* case, *supra*, and the Third Circuit Court of Appeals in *In re Solar Mfg. Corp., supra*, held that the Bankruptcy Act expressly and inherently empowers courts of bankruptcy in corporate reorganization proceedings to enforce accountings under trust indentures. None of the pertinent provisions of the Act, expressly or by implication, justifies a conclusion that the jurisdiction is complete upon an accounting involving an indenture trustee's misfeasance, but qualified upon an accounting involving nonfeasance (See Statute, Appendix, *infra*, pp. 25-27).

3. The Court of Appeals has decided an important question of federal law in a way probably in conflict with decisions of this Court, or which has not been but should be passed upon by this Court.

In holding that the jurisdiction of the bankruptcy court is qualified upon accountings by indenture trustees involving nonfeasance, the Court of Appeals relied upon, and apparently believed it was controlled by, New York law under the rule of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64.[8]

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[8] The Court of Appeals in its original decision, vacated after rehearing, relied upon *Smith* v. *Continental Bank*, 292 N. Y. 275, although it recognized that the rule of such case is unique and unsound (R. 1113-1115; 202 F. 2d 556-557). The subsequent majority opinion of the Court of Appeals refers to the *Smith* case as holding that in New York "a claim against a trustee for breach of his duty to protect the *res*, did not pass by transfer of the bond but remained the property of the transferer" (R. 1201; 202 F. 2d 559). The *Smith* case rule has been changed by statute in New York by amendment of Section 41 of the Personal Property Law, effective September 1, 1950 (McKinney's Consolidated Laws of

(Footnote continued on following page.)

This Court, however, has said that the *Erie* rule applies to "cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties" (*Guaranty Trust Co.* v. *York*, 326 U. S. 99, 109; *Levinson* v. *Deupree*, U. S. , 73 S. Ct. 914, 916; Hughes' Federal Practice, Vol. 17, Sec. 18514).

In the instant case, jurisdiction is based upon the Bankruptcy Act (*Brooklyn Trust Co.* v. *Kelby; In re Solar Mfg. Corp., supra*). State law, we submit, does not control courts of bankruptcy in determining the scope of their jurisdiction. "A bankruptcy court does not sit 'as another state court' and is not governed by state laws" (*In re V-I-D, Inc.*, 198 F. 2d 392, 396 (C. A. 7), cert. den., 344 U. S. 914).[9] The jurisdiction of courts of bankruptcy is "exclusive of the courts of the States" (28 U. S. C. former Secs. 41(19) and 371(6), as amended, 28 U. S. C. Sec. 1334).

Assuming *arguendo* that state law governs, the controlling state on the facts of this case would be Massachusetts, not New York.[10]

New York, Book 40, Sec. 41). The New York Law Revision Commission, recommending the amendment, stated that the *Smith* case rule is "contrary to the understanding and intention of the parties" and "at variance with the law of other states" (N. Y. Leg. Doc., 65(D), 1950). The *Smith* case has been roundly criticized (The Subsequent Bondholder and the Delinquent Trustee, 51 Col. L. Rev. 813; Right to Maintain Action for Breach of Trust After Transfer of Beneficial Interest, 59 Harv. L. Rev. 1286).

The law of Massachusetts is contrary to the *Smith* case (*Peterson* v. *Hopson*, 306 Mass. 597; *Cohen* v. *United States Securities Corp.*, 311 Mass. 152; *First Nat. Ins. Co.* v. *Salisbury*, 130 Mass. 303; *Dunning* v. *Bates*, 186 Mass. 123; *Hallett* v. *Moore*, 282 Mass. 380; *State Street Trust Company* v. *Walker*, 259 Mass. 578; *Young* v. *Haviland*, 215 Mass. 120; *Baker* v. *Allen*, 292 Mass. 169; *Pingree* v. *Comstock*, 18 Pick. (35 Mass.) 46; *Bouve* v. *Cottle*, 143 Mass. 310; *Milbank* v. *Littlefield*, 310 Mass. 55).

[9] See *Prudence Corp.* v. *Geist*, 316 U. S. 89; *Wragg* v. *Federal Land Bank of Orleans*, 317 U. S. 325; *Vanston Committee* v. *Green*, 329 U. S. 156; *Wright* v. *Central Ins. Co.*, 304 U. S. 502; *Holmberg* v. *Armbrecht*, 327 U. S. 392; *Board of Trade of City of Chicago* v. *Weston*, 243 Fed. 332 (C. A. 7).

[10] *Klaxon Co.* v. *Stentor Co.*, 313 U. S. 487; *Benton* v. *Safe Deposit Bank of Pottsville Pa.*, 255 N. Y. 260; *Mogul* v. *Jenkins Bros.*, 203 Misc. (N. Y.), 635; Beale on Conflict of Laws, Vol. 2, p. 1251. See footnote, *supra*, pp. 18-19.

4. The Court of Appeals has decided a question of importance to the public and jurisprudence generally in a way probably untenable, and has so far departed from established principles of law as to call for the exercise of this Court's powers of supervision.

Petitioners realize that decisions relating to the construction of trust instruments do not ordinarily merit review by this Court.

The merits of this cause, however, which were decided in petitioners' favor by the Master, were not passed upon by the District Court and were decided in the Court of Appeals in favor of the indenture trustee upon the basis of the majority construction of an indenture clause not there relied upon by the trustee. Had the trustee advanced the argument based upon such clause, which the majority Judges themselves advanced and then sustained, petitioners would have had an opportunity to be heard in reply (See, Petition for rehearing, R. 1253-1260). These circumstances indicate error and the need, in the interests of justice, for the exercise of this Court's power to remand the cause to the District Court for review upon the merits or for a review upon the merits by this Court.

This cause, moreover, involves a professional trustee under a trust indenture securing bonds sold to the public. Judge Frank, dissenting, states that the majority Judges have used "much ingenuity in interpreting ambiguous provisions of the indenture, with (I think) marked generosity to the trustee", that the majority decision "debases the noble word 'trustee', allows it to become a tricky decoy to catch and injure innocent investors", is more than passing "strange", "without precedent" and "against the precedents" (R. 1215, 1222-1223, 1234; 202 F. 2d 566, 569-570, 575).

The majority of the Court of Appeals, with admitted doubts and much speculation about the intent of the parties, has held that the intent was to give the indenture trustee

complete immunity against liability for any nonfeasance with respect to the trust *res*.

In reaching this conclusion, the majority, although recognizing that the "duty to care for the *res*" is inherent in a trust relationship (R. 1209; 202 F. 2d 563), has laid down two untenable rules governing trust indentures made to professional trustees to secure corporate bonds: (1) Exculpatory clauses must be strictly construed so as to resolve ambiguities in favor of the trustee draftsman of the instrument and against the bondholders; (2) A provision giving the trustee complete immunity against liability for any nonfeasance with respect to the trust *res* is not contrary to public policy.

These rules violate established principles of law.

The principle "rigorously applied to the construction of trust deeds * * * securing bonds" is that "ambiguous phrases are to be taken most strongly against" the draftsman.[11] This principle is especially applicable to exculpatory clauses.[12]

The second of the rules laid down by the majority is equally unsound. There is doubt whether an indenture clause exempting a trustee from liability for ordinary negligence is valid.[13] Settled, however, are the principles that a clause exempting the trustee from liability for gross negligence or wilful misconduct is invalid and contrary to public policy, and that continued nonfeasance, amounting

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[11] *Rothschild* v. *Rio Grande Western R. Co.*, 84 Hun 103, 109, 17 App. Div. 635, aff'd, 164 N. Y. 594; *Enoch* v. *Brandon*, 249 N. Y. 263, 268; *Prudence Co.* v. *Central Hanover*, 237 App. Div. 595, 601, aff'd, 261 N. Y. 420; *Harvey* v. *Guaranty Trust Co.*, 134 Misc. 417, 428, aff'd, 229 App. Div. 774, 256 N. Y. 526; *Sternberg* v. *Drainage Dist. No. 17*, 44 F. 2d 560, 562 (C. A. 8).

[12] Restatement, Law of Trusts, Secs. 174, 222; Scott on Trusts, Vol. 2, Sec. 222.2.

[13] *Litchfield* v. *White*, 7 N. Y. 438; *Hazzard* v. *Chase Bank*, 159 Misc. 57, aff'd, 257 App. Div. 950, 283 N. Y. 682, cert. den., 311 U. S. 708.

to supine or reckless indifference to the interests of the beneficiaries, constitutes gross negligence or wilful misconduct.[14]

A provision giving a trustee complete immunity against liability for any nonfeasance with respect to the trust *res* would embrace gross or wilful negligence, be wholly repugnant to a trust and a fraud upon the investing public.

The majority, indulging in the "guess" that purchasers of bonds secured by trust indentures "expect very little" "care and attention" from the trustees, has held in effect that a court of equity, absent a statute to the contrary, must affix to such a complete immunity stipulation its seal of good faith and fair dealing (R. 1211; 202 F. 2d 564). This is indeed a rule which, as Judge Frank said, debases the word "trustee", is without precedent and contrary to the precedents.

There are outstanding in the hands of the public billions of dollars of trust indenture securities.[15] The decision below, if permitted to stand, will, we submit, have a wide-

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[14] Restatement, Law of Trusts, Sec. 222; Scott on Trusts, Vol. 2, Sec. 222.3; *Rae* v. *Meek*, 14 App. Cas. 558, 572-573; *April* v. *April*, 272 N. Y. 331, 340; *Hazzard* v. *Chase Bank, supra; Browning* v. *Fidelity Trust Co.*, 250 Fed. 321, 327 (C. A. 3), cert. den., 248 U. S. 564; *Citizens Banking Co.* v. *Monticello State Bank*, 143 F. 2d 261, 267 (C. A. 8); *Seelig* v. *First Nat. Bank of Chicago*, 20 F. Supp. 61, 68 (D. C. N. D. Ill.); *Digney* v. *Blanchard*, 226 Mass. 335, 337; *Tuttle* v. *Gilmore*, 36 N. J. Eq. 617, 620-622; *Conover* v. *Guarantee Trust Co.*, 88 N. J. Eq. 450, 460-462, aff'd on opinion below, 89 N. J. Eq. 584; *State* v. *Comer*, 176 Wash. 257, 263-265; *Liberty Title & Trust Co.* v. *Plews*, 142 N. J. Eq. 493, 505-509; *Straus* v. *Chicago T. & T. Co.*, 273 Ill. App. 63, 71; *Kitchen Bros. Hotel Co.* v. *Omaha Safe Deposit Co.*, 126 Neb. 744, 754-755; The Trustee and the Trust Indenture, 46 Yale L. J. 737, 763, 782-783; Liability of the Trustee under the Corporate Indenture, 42 Harv. L. Rev. 198, 244-245.

[15] In 1934 securities outstanding under trust indentures totaled $37,000,000,000 (The Trustee and the Trust Indenture, 46 Yale L. J. 738). In 1944-1949 new corporate debt represented by bonds totalled $26,000,000,000 (The Subsequent Bondholder and the Delinquent Trustee, 51 Col. L. Rev. 813, n. 3).

spread adverse influence upon such securities, tend to encourage complaisance by indenture trustees, to open up a wide avenue for them to escape liability for breaches of trust, and to destroy the confidence of the investing public in the word "trustee". Application in other courts of the untenable rule of interpretation of trust indentures established by the decision below may alone tend to undermine or nullify the statutory safeguards established by the Trust Indenture Act of 1939 after a comprehensive study and report by the Securities and Exchange Commission (15 U. S. C. Sec. 77aaa et seq.).[16]

The majority decision, written by Judge Learned Hand, stands in striking contrast to the following principles enunciated by Judge Learned Hand in earlier cases:

> "* * * the meaning of a sentence may be more than that of the separate words, as a melody is more than the notes, and no degree of particularity can ever obviate recourse to the setting in which all appear and which all collectively create." (*Helvering* v. *Gregory*, 69 F. 2d 809, 810-811 (C. A. 2), aff'd, 293 U. S. 465.)

> "* * * That we should not so construe the intent of the parties as to foil their venture, is a cardinal principle of all interpretation." (*Manufacturers Trust Co.* v. *Kelby*, 125 F. 2d 650, 654 (C. A. 2), cert. den., 316 U. S. 697.)

> "* * * I do say that he (a trustee) may not strip himself of all his fiduciary duties after peppering a whole document with fiduciary verbiage. Complaisance after notice may bring upon him a just charge of 'gross negligence' or 'bad faith'; and that will serve." (*Clarke* v. *Chase Bank*, 137 F. 2d 797, 802 (C. A. 2), dissenting opinion.)

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[16] The majority, in guessing that purchasers of bonds "expect very little" "care and attention" from the trustees, and in stating that "abuses" have not "induced legislatures to intervene" (R. 1211; 202 F. 2d 564), overlooked the Trust Indenture Act of 1939, and the abuses which caused Congress to intervene.

"* * * the fiduciary element * * * is peculiarly intense in the case of a trust * * * a trust for the benefit of a numerous and changing body of bondholders appears to us to be preeminently an occasion for a scruple even greater than ordinary; for such beneficiaries often have too small a stake to follow the fate of their investment and protect their rights." (*Dabney* v. *Chase Bank,* 196 F. 2d 668, 670-671, C. A. 2.)

CONCLUSION

WHEREFORE, it is respectfully prayed that this petition for a writ of certiorari be granted.

Respectfully submitted,

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July 28, 1953.

APPENDIX

BANKRUPTCY ACT

CHAPTER IV

Sec. 24(a), 11 U. S. C. Sec. 47(a). The United States courts of appeals, in vacation, in chambers, and during their respective terms, as now or as they may be hereafter held, are invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdictions in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise, or reverse, both in matters of law and in matters of fact: *Provided, however,* That the jurisdiction upon appeal from a judgment on a verdict rendered by a jury shall extend to matters of law only: *And provided further,* That when any order, decree, or judgment involves less than $500, an appeal therefrom may be taken only upon allowance of the appellate court.

* * * * * *

SECTION 77B

Sec. 77B(b), (9), 11 U. S. C. Sec. 207(b), (9). A plan of reorganization within the meaning of this section * * *; (9) shall provide adequate means for the execution of the plan, which may include * * * the satisfaction or modification of liens, indentures, or other similar instruments, * * *: *Provided,* That the judge shall scrutinize and may disregard any limitations or provisions of any depositary agreements, trust indentures, committee or other authorizations affecting any creditor acting under this section and may enforce an accounting thereunder * * *.

* * * * * *

Sec. 77B(h), 11 U. S. C. Sec. 207(h). Upon final confirmation of the plan, the debtor and other corporation or

corporations organized or to be organized for the purpose of carrying out the plan, shall have full power and authority to, and shall put into effect and carry out the plan and the orders of the judge relevant thereto, under and subject to the supervision and control of the judge, and the property dealt with by the plan, when transferred and conveyed by the trustee or trustees to the debtor or the other corporation or corporations provided for by the plan, or, if no trustee has been appointed, when retained by the debtor pursuant to the plan or transferred by it to the other corporation or corporations provided for by the plan, shall be free and clear of all claims of the debtor, its stockholders and creditors, except such as may consistently with the provisions of the plan be reserved in the order confirming the plan or directing such transfer and conveyance or retention, and the court may direct * * * any mortgagee, the trustee of any obligation of the debtor, and all other proper and necessary parties, to make any such transfer or conveyance, * * *.

* * * * * *

CHAPTER X

Sec. 212, 11 U. S. C. Sec. 612. The judge may examine and disregard any provision of a deposit agreement, proxy, power or warrant of attorney, trust mortgage, trust indenture, or deed of trust, or committee or other authorization, by the terms of which an agent, attorney, indenture trustee, or committee purports to represent any creditor or stockholder, may enforce an accounting thereunder, may restrain the exercise of any power which he finds to be unfair or not consistent with public policy and may limit any claim or stock acquired by such person or committee in contemplation or in the course of the proceeding under this chapter to the actual consideration paid therefor.

* * * * * *

Sec. 216(10), 11 U. S. C. Sec. 616(10). A plan of reorganization under this chapter— * * * (10) shall provide adequate means for the execution of the plan, which may include: * * * the satisfaction or modification of liens, the cancellation or modification of indentures or of other similar instruments; * * *.

* * * * * * *

Sec. 227, 11 U. S. Sec. 627. The court may direct the debtor, its trustee, any mortgagees, indenture trustees, and other necessary parties to execute and deliver or to join in the execution and delivery of such instruments as may be requisite to effect a retention or transfer of property dealt with by a plan which has been confirmed, and to perform such other acts, including the satisfaction of liens, as the court may deem necessary for the consummation of the plan.

AUG 28 195
HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

PRUDENCE-BONDS CORPORATION (NEW CORPORATION), Successor Trustee of Prudence-Bonds Corporation, Debtor, GEORGE E. EDDY and ADA S. BEARDSLEY,

Petitioners,

vs.

STATE STREET TRUST COMPANY, as Trustee of Prudence-Bonds, Tenth Series, under Trust Agreement dated May 1, 1927, with Prudence-Bonds Corporation,

Respondent.

No. 211

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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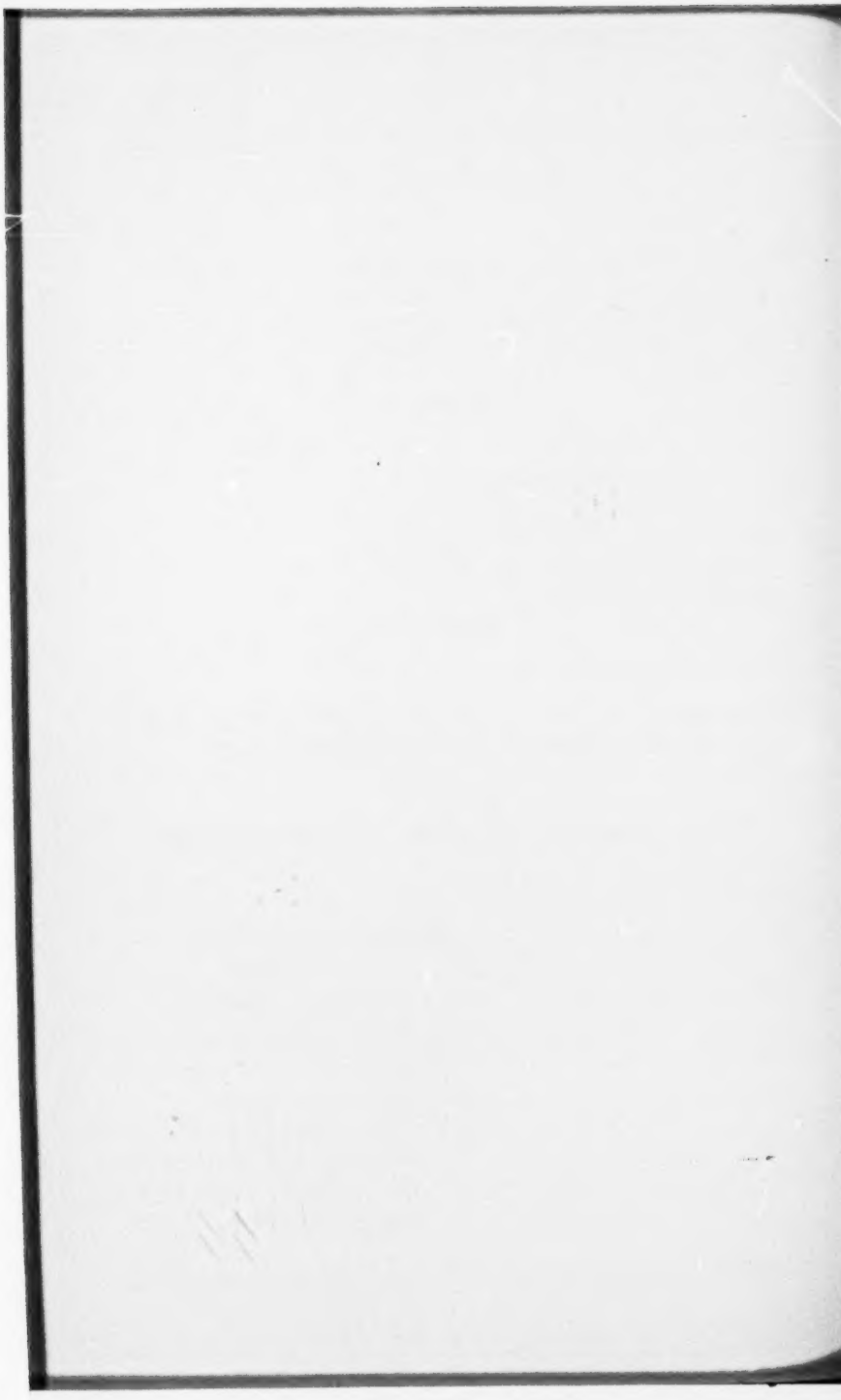

INDEX

	Page No.
Opinions Below	1
Jurisdiction	1
Statement	2
Proceedings Before the Special Master	4
Decision of the District Court	5
Decisions of the Court of Appeals	6
ARGUMENT	
I. THERE IS NO QUESTION FOR THIS COURT AS TO THE PROPRIETY OF THE COURT OF APPEALS' AFFIRMANCE ON A MATTER OF LAW, THE RECORD BEING COMPLETE AND THE FACTS UNDISPUTED	8
II. THE DECISION BELOW IMPOSED NO LIMITATION ON BANKRUPTCY JURISDICTION, AND THE ASSERTED CONFLICT DOES NOT EXIST	12
III. THE DECISION BELOW RAISES NO QUESTION OF FEDERAL LAW AND CONFLICTS WITH NO DECISION OF THIS COURT	14
IV. THE DECISION OF THE COURT OF APPEALS WAS NEITHER OF PUBLIC IMPORTANCE NOR UNTENABLE	16
CONCLUSION	19

Page No.

Table of Cases

Aberly *v.* Craven County, 70 F. 2d 52, 54 (4th Cir. 1934) ---------- 13

Barie *v.* Superior Tanning Co., 182 F. 2d 724, 728 (7th Cir. 1950) ---------- 9

Benton *v.* Safe Deposit Bank, 255 N. Y. 260, 265, 174 N. E. 648 (1931) ---------- 18

Board of Trade of City of Chicago *v.* Weston, 243 Fed. 332 (7th Cir. 1917) ---------- 15

Bull *v.* Sun Life Assurance Co., 141 F. 2d 456, 457 (7th Cir. 1944), *cert. den.*, 323 U. S. 723 (1944) 10

Central Hanover B. & T. Co. *v.* President, etc. of M. Co., 105 F. 2d 130, 132 (2d Cir. 1939) ---------- 15

Coburn *v.* Cedar Valley Land Co., 138 U. S. 196, 221 (1891) ---------- 11

Corn Exchange Bank *v.* Klauder, 318 U. S. 434, 436-7 (1943) ---------- 15

Dean *v.* Davis, 212 Fed. 88 (4th Cir. 1914), *aff'd*, 242 U. S. 438 (1917) ---------- 9

Denver *v.* Denver Union Water Co., 246 U. S. 178, 182 (1918) ---------- 10

Erie R. Co. *v.* Tompkins, 304 U. S. 64 (1938) ---------- 14, 15

Estabrook *v.* International Trust Co., 227 Mass. 281, 116 N. E. 486 (1917) ---------- 18

Eustace *v.* Dickey, 240 Mass. 55, 72-3, 132 N. E. 852 (1921) ---------- 17

Flannery Bolt Co. *v.* Flannery, 86 F. 2d 43, 44 (3rd Cir. 1936), *cert. den.*, 309 U. S. 671 (1940) 10

Frieze *v.* West American Ins. Co., 190 F. 2d 381, 382 (8th Cir. 1951) ---------- 10

Gideon *v.* Hinds, 238 Fed. 140, 141 (2d Cir. 1916) 12

Page No.

Green *v.* Title Guarantee & Trust Co., 223 App. Div. 12, 15 (1st Dep't 1928), *aff'd* 248 N. Y. 627 (1928) ---------- 18

Hazzard *v.* Chase National Bank, 159 Misc. 57, 80-81 (Sup. Ct. N. Y. Co. 1936), *aff'd*, 257 App. Div. 950 (1st Dep't 1939), *aff'd*, 282 N. Y. 652 (1940) ---------- 18

Helvering *v.* Gowran, 302 U. S. 238, 245 (1937) ... 9, 12

Holmberg *v.* Armbrecht, 327 U. S. 392 (1946) ... 15

Kam Koon Wan *v.* E. E. Black, Limited, 188 F. 2d 558, 563 (9th Cir. 1951), *cert. den.*, 342 U. S. 826 (1951) ---------- 9, 12

Knotts *v.* First Carolinas Joint Stock Land Bank, 86 F. 2d 551 (4th Cir. 1936), *cert. den.*, 300 U. S. 660 (1937) ---------- 9

Lanova Corp. *v.* National Supply Co., 116 F. 2d 235 (3d Cir. 1940) ---------- 9

Lindheimer *v.* Illinois Bell Telephone Co., 292 U. S. 151, 176 (1934) ---------- 13

McDonald *v.* Smalley, 1 Pet. 620 (1828) ---------- 11

Miller *v.* Robertson, 266 U. S. 243, 251 (1924) ... 17

Montgomery *v.* Gilbert, 77 F. 2d 39, 45 (9th Cir. 1935) ---------- 10

National Insurance Co. *v.* Tidewater Co., 337 U. S. 582, 598, 599 (1949) ---------- 15

New England Trust Company *v.* Paine, 317 Mass. 542, 550-1, 59 N. E. 2d 263 (1945) ---------- 19

New York Telephone Co. *v.* Maltbie, 291 U. S. 645 (1934) ---------- 13

North Adams National Bank *v.* Curtiss, 278 Mass. 471, 476-8, 180 N. E. 217 (1932) ---------- 19

Page No.

O'Brien *v.* Miller, 168 U. S. 287, 297 (1897) 17

Orenstein *v.* United States, 191 F. 2d 184, 193 (1st Cir. 1951) 11

In re Park Beach Hotel Bldg. Corporation, 96 F. 2d 886, 892 (7th Cir. 1938), *cert. den.*, 305 U. S. 638 (1938) 11

Park Lane Dresses *v.* Houghton & Dutton Co., 54 F. 2d 33 (1st Cir. 1931) 9

Partridge *v.* American Trust Co., 211 Mass. 194, 197, 97 N. E. 925 (1912) 18

Prudence Realization Corporation *v.* Geist, 316 U. S. 89 (1942) 15

Riley Co. *v.* Commissioner, 311 U. S. 55, 59 (1940) 12

In re Gustav Schaefer Co., 103 F. 2d 237, 242 (6th Cir. 1939), *cert. den.*, 308 U. S. 579 (1939) 9

In re Schwartz, 89 F. 2d 172, 173 (2d Cir. 1937) .. 9, 13

Securities Commission *v.* Chenery Corp., 318 U. S. 80, 88 (1943) 9

Slocum *v.* Edwards, 168 F. 2d 627, 632 (2d Cir. 1948) 10

State Mutual Life Assur. Co. *v.* Fleischer, 186 F. 2d 358, 364 (8th Cir. 1951) 10

Taber *v.* Beaudette & Graham Co., 262 Mass. 99, 103, 159 N. E. 505 (1928) 17

Thompson *v.* Magnolia Co., 309 U. S. 478, 483-4 (1940) 15

Tischendorf *v.* Lynn Mutual Fire Ins. Co., 190 Wis. 33, 208 N. W. 917 (1926) 17

Tyrrell *v.* District of Columbia, 243 U. S. 1, 5 (1917) 13

United States *v.* Stage Company, 199 U. S. 414, 423 (1905) 17

Page No.

Vanston Committee *v.* Green, 329 U. S. 156 (1946) 15

In re V-I-D, Inc., 198 F. 2d 392 (7th Cir. 1952), *cert. den.*, 344 U. S. 914 (1953) 15

White *v.* Higgins, 116 F. 2d 312, 321 (1st Cir. 1940) 10

Williams *v.* Austrian, 331 U. S. 642, 658 (1947) 15

Wragg *v.* Federal Land Bank of New Orleans, 317 U. S. 325 (1943) 15

Wright *v.* Union Central Ins. Co., 304 U. S. 502 (1938) 15

STATUTES

11 U. S. C. § 47(a) 8

11 U. S. C. § 47(c) 2

28 U. S. C. § 1254(1) 2

28 U. S. C. § 1652 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

PRUDENCE-BONDS CORPORATION (NEW CORPORATION), Successor Trustee of Prudence-Bonds Corporation, Debtor, George E. Eddy and Ada S. Beardsley,

Petitioners,

vs.

STATE STREET TRUST COMPANY, as Trustee of Prudence-Bonds, Tenth Series, under Trust Agreement dated May 1, 1927, with Prudence-Bonds Corporation,

Respondent.

No. 211

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The opinion of the District Court (R. 461) is reported at 101 F. Supp. 729. The opinion of the Court of Appeals on the appeal (R. 1112) is reported at 202 F. 2d 555. The opinion of the same Court on rehearing (R. 1197) is reported at 202 F. 2d 558.

Jurisdiction

The judgment of the Court of Appeals (R. 1237) was entered on March 3, 1953. The petition for writ of cer-

tiorari was filed on July 28, 1953, the time having been extended by order of Mr. Justice Burton.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1). Petitioners also claim jurisdiction under 11 U. S. C. § 47(c).

Statement

The decision below, made on a trustee's accounting, turned on construction of a particular trust indenture. On the basis of its construction the Court of Appeals held that the respondent trustee had breached no duty to the bondholders.

The trust indenture was entered into as of May 1, 1927, between Prudence Bonds Corporation (herein called "the Debtor") and respondent State Street Trust Company, as Trustee, to secure an issue of Prudence Bonds (R. 726-769). The indenture was first submitted in draft form to respondent for approval (R. 1070), and after execution by the Debtor (R. 1070) was executed by respondent on counsel's opinion that the indenture was "in sufficiently satisfactory form for you to accept" (R. 769, 778).

The indenture provided for two separate guaranties of The Prudence Company, Inc. (herein called "the Guarantor"). The primary one was a guaranty of the bonds themselves, which was attached to the indenture (R. 770-6) and endorsed upon each bond (R. 741-2). The other, which is here involved, was a guaranty of mortgage collateral (R. 776). This guaranty was referred to by the Court of Appeals as "the Secondary Guaranty" (R. 1199), and the Guarantor itself pointed out that "As this guarantee coincides with the guarantee that appears on the bonds, it seems superfluous" (R. 1082).

Respondent accepted the trust, as the indenture provided in Article V, Section 1, "upon the distinct understanding and agreement", among other things, that it should not "take any action in respect to any default or 'event of default' unless requested to take action in respect thereto by a writing signed by the holders of not less than

twenty-five per centum in principal amount" of the outstanding bonds. Such provision was "intended only for the protection of the Trustee" (R. 758). This prohibition was complemented by other clauses limiting respondent's duties, among which were Article I, Section 5, which provided in part that the Debtor or Guarantor should collect and retain all interest and principal on the collateral, subject to Article III, Section 1(i), and that respondent should enforce any agreements contained in the collateral, upon written request and indemnification, in the manner directed by the Debtor (R. 734).*

These and the other provisions of the indenture were brought to the attention of and made binding on the bondholders. Each bond stated on its face that it was issued under and secured by the indenture, referred to the indenture for a description of "the rights and remedies of the Trustee and the respective holders of said Prudence-Bonds" and "the terms and conditions under which said bonds are secured, issued and guaranteed", and provided that "the holder hereof is bound thereby." (R. 739). The primary guaranty endorsed on each bond provided that by acceptance of the bond the holder agreed to all provisions and conditions of the indenture, "including those limiting the exercise by the Trustee of rights and remedies thereunder upon default." (R. 723, 741-2).

One of the mortgages, known as the Guyon mortgage, fell into default in principal and later in interest (R. 465). While the Guarantor breached the Secondary Guaranty in connection with the Guyon default (R. 1206), both principal

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* Article III, Section 1(i), providing for collection, reports and for payments equivalent to principal collections, expressly absolved respondent of any duty to see to the receipt of such reports or to take any action with respect thereto (R. 750). Among other provisions of the indenture similarly limiting the duties of respondent were Article I, Section 3(b); Article I, Section 6; Article I, Section 7; and Article V, Section 4 (R. 733-7, 763). The last paragraph of Article IV, Section 1, forbade respondent to interfere with any rights of the Debtor or Guarantor or to exercise any remedies for defaults until the Guarantor had failed to meet its primary guaranty of the bonds (R. 752).

and interest of the bonds themselves continued to be paid either by the Debtor or the Guarantor for several more years (R. 322, 11, 472). Respondent concededly took no action against the Guarantor for such breach of the Secondary Guaranty (R. 110, 356, 472).

No bondholder ever requested respondent to take any action with respect to such default on the Secondary Guaranty (R. 141-2, 382). Respondent did not know the names and addresses of the bondholders since the bonds were largely in bearer form and it was not paying agent therefor (R. 145-7, 324, 472).

During the depression both the Debtor and the Guarantor went into reorganization (R. 322-3, 472). In the course of the Debtor's reorganization proceedings the Court directed respondent to account (R. 28). Respondent filed its account verified August 30, 1938 (R. 43-78), and its petition for discharge verified September 1, 1938 (R. 39-42).

Petitioners filed three objections to the account (R. 85-93). The first two charged dissipations of collateral. The third alleged failure to enforce the Secondary Guaranty. The District Court referred the issues to a Special Master to hear and report (R. 93, 278).

Proceedings Before the Special Master

The Special Master received documentary evidence and heard testimony on all issues raised by the objections (R. 94), and when further issues were raised the hearings were reopened and further evidence admitted (R. 151). Not only the jurisdictional issue but the merits as well were fully tried and argued. The record was complete, and contained facts largely undisputed.

The briefs of both sides argued the effect of various provisions of the indenture, including Article V, Section 1.*

The Special Master's report (R. 278-391) recommended dismissal of the first objection and a surcharge of some

* The effect of this provision was argued at p. 18 of respondent's brief and at pp. 37-40 of petitioners' brief.

$22,375 on the second objection (R. 388). The report rejected respondent's argument that the District Court lacked jurisdiction of the third objection and recommended that respondent be surcharged thereon (R. 309, 388).

Decision of the District Court

In the District Court the briefs of both sides again argued the applicability of Article V, Section 1, among other indenture provisions.*

The District Court adopted many of the Special Master's findings and conclusions, rejected others, and omitted to pass on the remainder as being unnecessary to its decision. In addition, it made independent findings and conclusions on all three objections (R. 11-13, 472-4). Among the findings of the Special Master adopted by the District Court were findings that respondent made no profits or gains from any of its acts or omissions complained of, and that it "acted in entire good faith in the performance of its duties" under the indenture (R. 388, 472, 11).

The District Court dismissed the first objection on the merits, as recommended by the Special Master. It disagreed with the Special Master's recommendation on the second objection and reduced the surcharge thereon to some $16,625 (R. 14, 463). As to the third objection the Court held that it lacked jurisdiction, on the ground that the objection sought damages personal to the bondholders rather than restoration of trust assets, and therefore dismissed (R. 13-14, 467-71). The Court noted that various defenses of respondent, including those based on indenture provisions, might be further obstacles to a surcharge on the third objection but found it unnecessary to discuss them in view of its determination that jurisdiction was lacking (R. 471).

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* Respondent argued the point at pp. 24-26 of its memorandum and petitioners did so at pp. 14-16 of their reply memorandum.

Decisions of the Court of Appeals

Petitioners' appeal to the Court of Appeals was based on the full record containing all testimony and exhibits, including the indenture. Petitioners urged reversal of the District Court's decree on all three objections, advancing their interpretation of indenture provisions as ground for reversing on the first objection.

As to the third objection petitioners' brief contended that the District Court had jurisdiction and also argued at length that Article V, Section 1, and Article I, Section 5, did not relieve respondent of a duty to enforce the Secondary Guaranty (Br. pp. 23-8), and that "Neither these sections, nor any other provision, exempts it from such duty." (Br. p. 24). They urged the Court to reverse and to surcharge respondent on the merits (Br. p. 50). This is conceded by the petition herein (p. 8).

Respondent's brief, in addition to arguing the jurisdictional question, contended that respondent was inhibited by various indenture provisions from enforcing the Secondary Guaranty (Br. pp. 26-33).*

Petitioners' reply brief asked the Court of Appeals to reverse on the merits, and not to remand to the District Court since the facts were disclosed by documentary evidence. They said (Reply br. pp. 14-15):

> "The facts are not complicated, nor are they disputed; the evidence is all documentary and it is all in the record on appeal. This is an equity proceeding and this Court undoubtedly has the power to pass upon the whole case and grant the judgment which the Court below ought to have granted. Except on appeals involving judgments rendered on jury verdicts this Court has jurisdiction to 'review, affirm, revise or reverse,

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* The arguments which respondent did not detail, on the ground that they involved consideration of "complicated facts upon which the District Court declined to pass" (*cf.* petition herein, p. 8), were addressed to defenses other than those based upon indenture provisions (Br. pp. 35-6).

both in matters of law and in matters of fact' (Bankruptcy Act, Sec. 24, 11 U. S. C. Sec. 47). In an equity case there 'can be no question,' as stated in *Thornton* v. *Carter,* 109 F. 2d 316, 319, 'of the right of an appellate court of the United States, when it reverses a case, to direct the entry of a proper judgment or decree in the lower court and thus terminate the litigation on the merits.' (See also, *Herzberg's Inc.* v. *Ocean Acc. & Guarantee Corp.,* 132 F. 2d 438, 441). The Bank, in effect, has had two trials before the Master, and no useful purpose would be served by sending parts of the case back to the District Court to interpret some of the Master's rulings on questions of law or as to facts disclosed by documentary evidence."

The Court of Appeals affirmed the District Court's decree, upholding dismissal of the third objection on the ground, based on New York decisions, that the District Court lacked jurisdiction (R. 1112-6).

Petitioners then applied for rehearing as to the third objection, on the ground that the Court had erroneously applied New York law in determining lack of jurisdiction. The petition requested rehearing "To the end, therefore, that this case may be concluded on the merits * * *" (R. 1126).

Having entertained the petition and received briefs and argument, the Court of Appeals, per L. Hand, J., held that the District Court did have jurisdiction of the third objection and then held, on the basis of the documentary evidence in the record, that indenture provisions by which the bondholders were bound provided a complete defense to respondent. The principal provision relied on was the duty-limiting clause of Article V, Section 1, quoted hereafter (pp. 16-17) (R. 758). The Court held that by virtue of such provision, when read in the context of other duty-limiting provisions of the indenture, respondent had no duty to take action on the Secondary Guaranty except upon receipt of the prescribed written demand, and that the absence of such demand was a complete defense (R. 1204-10).

Petitioners then applied for a second rehearing, arguing that the Court of Appeals had erroneously construed the indenture, and that the provisions as so construed were void (R. 1242). There was no contention that the Court should not have passed on the indenture provisions in the absence of a construction thereof by the District Court. It was instead contended that "The finality of this Court's decisions", among other things, warranted "reversal of the majority decision, and acceptance of the dissent as the rule of this Court" (R. 1263-4). The second petition for rehearing was denied (R. 1266).

ARGUMENT

I

There is no question for this Court as to the propriety of the Court of Appeals' affirmance on a matter of law, the record being complete and the facts undisputed.

The judgment of the District Court dismissed the third objection for lack of jurisdiction, a matter of law. The Court of Appeals, having held that there was jurisdiction, affirmed the judgment on another matter of law, the indenture provisions, which the District Court had mentioned but found it unnecessary to discuss. The contention that the Court of Appeals, in so doing, probably exceeded its powers and conflicted with the Bankruptcy Act and with other decisions of Courts of Appeals, is wholly contrived and insubstantial.

The section of the Bankruptcy Act invoked, 11 U. S. C. § 47(a), is not a limitation but a broad grant of power. The statute does not preclude a Court of Appeals from disposing of an appeal on a legal ground not determined by the Court below. The statute permits a Court of Appeals to "review", "affirm", and "revise" "in matters of law", and the disposition here made by the Court was precisely that. To the undisputed facts in the record the Court applied the provisions of the indenture. Its determination

was purely one of law. The dissenting opinion agreed with the opinion of the Court that, having determined there was jurisdiction, the Court should dispose of the case on the merits (R. 1212).

All issues in the case were tried and retried before the Special Master. The entire record, consisting largely of documentary evidence, was before the Court of Appeals. That Court was empowered to affirm the judgment of the bankruptcy court on any ground supported by the record. In *In re Gustav Schaefer Co.*, 103 F. 2d 237, 242 (6th Cir. 1939), *cert. den.*, 308 U. S. 579 (1939), the Court said:

> "Upon an appeal in equity or bankruptcy, the appellate court will dispose of the case if the entire record is before it. [Citations] The record here is complete and we may make final disposition rather than remand for further hearing."

Courts of Appeals have power to affirm not only on a ground which was raised and rejected in the bankruptcy court, but also on a ground not raised at all in the bankruptcy court, and even on a ground not raised either in the bankruptcy court or in the Court of Appeals. *Dean* v. *Davis*, 212 Fed. 88 (4th Cir. 1914), *aff'd*, 242 U. S. 438 (1917); *In re Schwartz*, 89 F. 2d 172, 173 (2d Cir. 1937); *Park Lane Dresses* v. *Houghton & Dutton Co.*, 54 F. 2d 33 (1st Cir. 1931); *Knotts* v. *First Carolinas Joint Stock Land Bank*, 86 F. 2d 551 (4th Cir. 1936), *cert. den.*, 300 U. S. 660 (1937). These authorities merely apply to bankruptcy appeals the general principle that a judgment below based upon an insufficient ground will be affirmed upon any sufficient ground supported by the record, regardless whether that ground was passed upon or even raised in the lower court.*

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* Lanova Corp. *v.* National Supply Co., 116 F. 2d 235 (3d Cir. 1940); Kam Koon Wan *v.* E. E. Black, Limited, 188 F. 2d 558, 563 (9th Cir. 1951), *cert. den.*, 342 U. S. 826 (1951); Barie *v.* Superior Tanning Co., 182 F. 2d 724, 728 (7th Cir. 1950). See Helvering *v.* Gowran, 302 U. S. 238, 245 (1937); Securities Commission *v.* Chenery Corp., 318 U. S. 80, 88 (1943).

This principle of appellate review is particularly applicable where, as here, the interpretation of a written instrument is involved. See *Bull* v. *Sun Life Assurance Co.*, 141 F. 2d 456, 457 (7th Cir. 1944), *cert. den.*, 323 U. S. 723 (1944); *State Mutual Life Assur. Co.* v. *Fleischer*, 186 F. 2d 358, 364 (8th Cir. 1951). No possible purpose would have been served by remanding for an interpretation by the District Court, which was in no better position to interpret the instrument than was the Court of Appeals. *Flannery Bolt Co.* v. *Flannery*, 86 F. 2d 43, 44 (3d Cir. 1936), *cert. den.*, 309 U. S. 671 (1940). See *Denver* v. *Denver Union Water Co.*, 246 U. S. 178, 182 (1918); *Frieze* v. *West American Ins. Co.*, 190 F. 2d 381, 382 (8th Cir. 1951). As the Court said in *White* v. *Higgins*, 116 F. 2d 312, 321 (1st Cir. 1940):

> "In the present cases the District Court has made no finding either way on the issue whether the grantors remained owners of the corpus of the respective estates, because the court did not think Section 213 could be considered. But on the record before us, it would not be appropriate to remand the cases for further findings of fact. The underlying facts have been stipulated, and there seems to be nothing outside the terms of the trust instruments bearing on the 'basic issue.' The District Court is in no better position than we are to draw the ultimate conclusion. An examination of the trust instruments, in the light of the Clifford case and its rationale, leads us to the conclusion that as a matter of law the income of the trusts is taxable to the respective grantors. * * *"

No different rule exists where the judgment of the bankruptcy court rests upon lack of jurisdiction rather than upon the merits. On appeal from such a judgment, if the Court of Appeals holds that there is jurisdiction it may properly refuse to remand and may dispose of the case on the merits if the record is sufficient. *Slocum* v. *Edwards*, 168 F. 2d 627, 632 (2d Cir. 1948).* The principle is the same

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* The converse is also true, and a Court of Appeals may affirm on jurisdictional grounds a judgment based below on the merits. Montgomery *v.* Gilbert, 77 F. 2d 39, 45 (9th Cir. 1935).

whether the Court of Appeals reverses, as in the *Slocum* case, or affirms, as in the case at bar.

It is only where the record is insufficient to permit termination of the litigation that Courts of Appeals refuse to determine questions not passed on below and remand to remedy the defect. The cases cited by petitioners at page 13 and at footnote 3, page 14 (only a few of which involved bankruptcy appeals), are cases of this type and therefore not pertinent here.*

Petitioners concede (p. 14) that "except on appeals involving jury verdicts, a Court of Appeals is empowered, when it reverses a cause, to direct the entry of a proper judgment in the lower court and thus terminate the litigation upon the merits." If a Court of Appeals may do this when it reverses, there is no reason why it cannot do the same thing when it affirms. It is also purely a matter of form rather than substance whether the Court of Appeals terminates the litigation by directing entry of a proper judgment in the lower court or by entering that judgment itself.

Moreover, petitioners' present position is squarely opposed to their position in the Court of Appeals, where they urged that Court to determine the merits and not to remand to the District Court (see p. 6 *supra*). Even if there were error below, a party "will not ordinarily be permitted to complain of an error which he himself invited or which at his instance the court committed." *Orenstein* v. *United States*, 191 F. 2d 184, 193 (1st Cir. 1951); *In re Park Beach Hotel Bldg. Corporation*, 96 F. 2d 886, 892 (7th Cir. 1938), *cert. den.*, 305 U. S. 638 (1938). See *Coburn* v. *Cedar Valley Land Co.*, 138 U. S. 196, 221 (1891).

While petitioners now urge that the Court of Appeals erred in disposing of the case on the merits, as they asked it to do, they also argue that the Court of Appeals erred in not reversing on the merits and holding respondent liable

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* In McDonald *v.* Smalley, 1 Pet. 620 (1828) the record, contrary to petitioners' statement (p. 13), was limited to the jurisdictional issues, and the quotation is not taken from the opinion of the Court.

(specification of error No. 9, p. 12). They further ask for "a review upon the merits by this Court." (p. 20). If petitioners were ever entitled to a remand, they have now abandoned any claim to it. Petitioners' only quarrel with the Court of Appeals is not that it decided the merits, but that it did not decide in their favor.

II

The decision below imposed no limitation on bankruptcy jurisdiction, and the asserted conflict does not exist.

The contention that the decision of the Court of Appeals "has placed an untenable limitation upon the jurisdiction of courts of bankruptcy" raises, upon this record, an abstract and fanciful question. The Court of Appeals decided that it did have jurisdiction. That decision was in petitioners' favor and is not challenged by them. Their only complaint is as to the reasoning which led to that decision, and all they seek is a correction of that reasoning.

Such an objective is not a ground for review by an appellate court. "In the review of judicial proceedings the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason." See *Helvering* v. *Gowran,* 302 U. S. 238, 245 (1937). As was said in *Gideon* v. *Hinds,* 238 Fed. 140, 141 (2d Cir. 1916), "An appeal brings up the ultimate question whether the decision appealed from was right or wrong; and if the result was right it is a matter of no moment that the reasons assigned for judgment may have been erroneously stated." See *Riley Co.* v. *Commissioner,* 311 U. S. 55, 59 (1940); *Kam Koon Wan* v. *E. E. Black, Limited,* 188 F. 2d 558, 563 (7th Cir. 1951), *cert. den.,* 342 U. S. 826 (1951).

Petitioners have no standing to seek review of the decision that there was jurisdiction, or of the reasoning by which that decision was reached, for they were harmed

by neither. As the Court said in *In re Schwartz*, 89 F. 2d 172, 173 (2d Cir. 1937):

> "It is obvious that an objecting creditor cannot be aggrieved by an order which denies the bankrupt his discharge. Denial of the discharge gives the full measure of relief sought by the creditor; and he has obtained it whether the judge rests his decision on one ground or another. * * * It is the correctness of the judgment, not the legal reasoning by which it was reached, that an appeal challenges * * *. A successful litigant is not injured, and may not appeal, merely because a court has rejected or failed to adopt some of his contentions."

Manifestly petitioners are not harmed by a decision as to jurisdiction in their favor, whatever the basis. See *Lindheimer* v. *Illinois Bell Telephone Co.*, 292 U. S. 151, 176 (1934); *New York Telephone Co.* v. *Maltbie*, 291 U. S. 645 (1934); *Aberly* v. *Craven County*, 70 F. 2d 52, 54 (4th Cir. 1934).

Like the decisions in the other cases cited by petitioners, the decision below held that there was jurisdiction on the facts involved. Thus, all the decisions are harmonious, and the asserted conflict is non-existent. For the same reason there can be no conflict between the decision below and the cited provisions of the Bankruptcy Act. Assuming those provisions were at all applicable, none of them is flouted by the decision of the Court of Appeals that it had jurisdiction.

The claimed qualification in the Court of Appeals' determination of jurisdiction could not be a conflicting decision since it was merely reasoning and not a decision at all. Any implication as to a possible limitation on jurisdiction was, as this Court stated in *Tyrrell* v. *District of Columbia*, 243 U. S. 1, 5 (1917), at most "only reasoning deemed by the court to throw light upon its conclusion on the subject which was before it * * * and as a prelude to the ground upon which the judgment rendered was rested * * *". Moreover, the supposed jurisdictional limitation

was not made. The Court expressly declined to decide whether jurisdiction depended upon non-transfer of the bonds, saying (R. 1202), "We do not find it necessary to decide what was the effect of a transfer of any of the bonds in New York * * *".

III

The decision below raises no question of federal law and conflicts with no decision of this Court.

The argument that the Court of Appeals wrongly decided a question of federal law is based on the premise that its decision limited the jurisdiction of the bankruptcy court. The falsity of that premise and petitioners' lack of standing to urge it have been shown above (pp. 12-14). The utter lack of substance in the effort to portray the discussion by the Court of Appeals as an important decision requiring review by this Court is emphasized by petitioners' complaint that the Court below "apparently believed it was controlled by, New York law under the rule of *Erie R. Co.* v. *Tompkins,* 304 U. S. 64." They seek certiorari to correct this "apparent belief", which they attempt to elevate to the status of a decision. Yet petitioners concede (pet. p. 10) that the Court of Appeals made its decision "upon certain assumptions" "avoiding any decision as to what law governed the issue of jurisdiction".

Even if the "apparent belief" that New York law controlled had been the actual decision, there is no basis for the intimation that it was induced through a misapprehension as to the *Erie* case, which was not even mentioned. The applicability of state law to a question respecting which the Bankruptcy Act did not "otherwise require or provide," rested, on well-established principles, on the Rules of Decision Act (28 U. S. C. § 1652).

This accounting, although held in the bankruptcy court, was not "a bankruptcy cause" or "a summary proceeding" in bankruptcy. It was held in the bankruptcy court as a matter of convenience, not because of any require-

ment of the Bankruptcy Act, and could equally well have been brought in another forum. *Central Hanover B. & T. Co.* v. *President, etc. of M. Co.*, 105 F. 2d 130, 132 (2d Cir. 1939).

The Debtor's reorganization made the federal court available as a forum, but federal law did not otherwise contribute to the case. *Williams* v. *Austrian*, 331 U. S. 642, 658 (1947); *National Insurance Co.* v. *Tidewater Co.*, 337 U. S. 582, 598, 599 (1949). The duties of respondent and the rights of the bondholders were created by state law.* The Bankruptcy Act prescribed no standards for fixing the nature or extent of the liabilities of an indenture trustee. The choice of a federal tribunal did not alter the nature of the rights to be enforced therein, and those rights were properly determined by state law.**

* * * *

The second and third reasons urged by petitioners ignore the holding of the Court, in petitioners' favor, that there was jurisdiction and complain that the opinion suggested an unsound limitation on jurisdiction which is a matter of substantial importance and should be reviewed by this Court. If, however, after the Court had decided the

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* This was so before as well as after Erie R. Co. *v.* Tompkins, *supra.* Corn Exchange Bank *v.* Klauder, 318 U. S. 434, 436-7 (1943) and footnote 8; Thompson *v.* Magnolia Co., 309 U. S. 478, 483-4 (1940). In re V-I-D, Inc., 198 F. 2d 392 (7th Cir. 1952), *cert. den.*, 344 U. S. 914 (1953), and the cases cited by petitioners at page 19, footnote 9, were cases governed by express provisions of the Bankruptcy Act; they therefore have no bearing on the situation here presented. The former case and Prudence Realization Corporation *v.* Geist, 316 U. S. 89 (1942), and Vanston Committee *v.* Green, 329 U. S. 156 (1946), all involved the allowance of claims, a subject clearly controlled by the Bankruptcy Act. Wragg *v.* Federal Land Bank of New Orleans, 317 U. S. 325 (1943), Wright *v.* Union Central Ins. Co., 304 U. S. 502 (1938) and Board of Trade of City of Chicago *v.* Weston, 243 Fed. 332 (7th Cir. 1917), dealt with jurisdiction over property of a debtor in situations where the Bankruptcy Act had specific provisions on the subject. Holmberg *v.* Armbrecht, 327 U. S. 392 (1946), dealt with a federal-created right and had nothing to do with bankruptcy.

** It was immaterial whether the law of Massachusetts or of New York applied. The law of both jurisdictions is the same. See respondent's brief on rehearing (R. 1159-65).

jurisdictional question in petitioners' favor, it had also decided for them on the merits of the case—as they strongly urged it to do—the alleged question of substantial importance would be exactly the same with exactly the same need for answer. Yet under such circumstances it could hardly be imagined that this petition would have been filed for the purpose of raising that question.

IV

The decision of the Court of Appeals was neither of public importance nor untenable.

This is a private controversy, of concern only to the private litigants. The decision of the Court of Appeals turned on construction of a particular trust indenture, a question which petitioners concede does "not ordinarily merit review by this Court." That there may be a large number of bonds outstanding under other indentures does not change this case to one of public importance. The Court's decision establishes no precedent of general application, and courts will continue to solve questions of construction on the basis of the particular language in a particular instrument.

The complaint that the Court of Appeals laid down "two untenable rules governing trust indentures" is unfounded.

The first alleged error is that the Court ruled that exculpatory clauses must be construed by resolving ambiguities in favor of the trustee draftsman. But the Court in fact made no such "ruling", and, as already pointed out, (p. 2) respondent was not the draftsman. In construing the indenture the Court carefully analyzed Article I, Section 5, and Article III, Section 1(i), which limited the duties of respondent, and rested its decision principally on the related provisions of Article V, Section 1, which provided, in pertinent part:

> "* * * nor shall the Trustee take any action in respect to any default or 'event of default' unless re-

> quested to take action in respect thereto by a writing signed by the holders of not less than twenty-five per centum in principal amount of the Prudence-Bonds issued hereunder and then outstanding * * *." (R. 75t)

In construing these provisions as applicable to the Secondary Guaranty the Court found no reason "which compels us deliberately to defeat what would be the unavoidable construction of the words in any other document" (R. 1207-8), and concluded that there was not "any doubt in our minds that the parties meant to give complete immunity to the Trustee for any nonfeasance in suing either the mortgagors or the Guarantor." (R. 1210). In thus grounding its decision on an examination of all related provisions of the indenture the Court followed long-established principles of construction.*

Petitioners' second contention, that the Court of Appeals should have held the duty-limiting provisions of the indenture invalid as against public policy, is equally groundless. None of the complementary provisions upon which the Court relied granted respondent blanket immunity against any liability for nonfeasance. Those provisions were not exculpatory clauses relieving respondent of liability for inaction; they negatived any duty to act, and Article V, Section 1 in fact prohibited action in the premises.**

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* Miller *v.* Robertson, 266 U. S. 243, 251 (1924); United States *v.* Stage Company, 199 U. S. 414, 423 (1905); O'Brien *v.* Miller, 168 U. S. 287, 297 (1897); Eustace *v.* Dickey, 240 Mass. 55, 72-3, 132 N. E. 852 (1921). The Court in pressing "with unusual persistence the doubts that cannot but inhere" in the process of construction and in being "satisfied with no extension of the literal meaning unless it satisfies every logical compunction" (R. 1210) gave ample scope to the doctrine of strict construction, which is applicable only where ambiguities may not be otherwise resolved. Tischendorf *v.* Lynn Mutual Fire Ins. Co., 190 Wis. 33, 208 N. W. 917 (1926). The cases cited by petitioners at footnote 11 on page 21, where stating the rule, make clear that it is confined to cases where ambiguities exist. The rule is "to be resorted to only when all other rules of construction fail." Taber *v.* Beaudette & Graham Co., 262 Mass. 99, 103, 159 N. E. 505 (1928).

**In none of the cases cited by petitioners was a duty-limiting clause, such as the one here involved, held to violate public policy.

The public policy of both Massachusetts and New York upholds the validity of such duty-limiting provisions. In *Partridge* v. *American Trust Co.*, 211 Mass. 194, 197, 97 N. E. 925 (1912), the Supreme Judicial Court of Massachusetts said:

> "By the fourth article the trustee was not required except upon default by the debenture company, and then only upon request in writing 'of the holder or holders of a majority of the debentures in default,' to record at once, 'all unrecorded assignments to it of mortgages held by it under the provisions thereof,' * * *. Viewed in the light of what has happened it may be that the rights of the bondholders were insufficiently protected, but until they have complied with the terms of this article, and the trustee has neglected or refused to perform, neither defendant can be charged with unfaithful administration, or compelled to account generally."

See also *Estabrook* v. *International Trust Co.*, 227 Mass. 281, 116 N. E. 486 (1917). And in *Benton* v. *Safe Deposit Bank*, 255 N. Y. 260, 265, 174 N. E. 648 (1931)* the New York Court of Appeals said:

> "The duty of the trustee is measured and limited by its agreement. This * * * stated that the trustee was under no duty to record the instrument. Such agreements are legal and binding, unless they are contrary to some statute or against the public policy of the State. We can see no reason why such an agreement is not binding upon the mortgagor and the trustee, and those who have purchased the notes with notice of the mortgage and opportunity to fully examine its terms and conditions."

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*In the Benton case, the court purported to apply the law of Pennsylvania, but intimated that New York law did not differ. It does not differ. Green *v.* Title Guarantee & Trust Co., 223 App. Div. 12, 15 (1st Dep't 1928), aff'd 248 N. Y. 627 (1928); Hazzard *v.* Chase National Bank, 159 Misc. 57, 80-81 (Sup. Ct. N. Y. Co. 1936), aff'd, 257 App. Div. 950 (1st Dep't 1939), aff'd, 282 N. Y. 652 (1940).

No question of "reckless indifference" or "gross negligence" arose in the foregoing cases, and any talk about that type of misconduct is likewise irrelevant in the present case. Whatever may be the rule as to clauses attempting to relieve a trustee of liability for plain breach of trust, there can be no question of "reckless indifference" or "gross negligence" where no duty exists. Even in the case of ordinary exculpatory clauses, the only limitation on the effectiveness thereof in Massachusetts is bad faith and no different rule applies to corporate trustees.* Respondent's good faith and lack of self-dealing were expressly found by the Special Master and affirmed by the District Court (R. 388, 472, 11), and any finding of recklessness or other aggravated misconduct is significantly absent.

The Court of Appeals' construction of the indenture is hardly one to call for the exercise of this Court's powers of supervision.

CONCLUSION

There were two petitions for rehearing in the Court of Appeals, its decision was thoroughly considered, and there is no more reason for review by this Court than in the countless number of other cases where one party is dissatisfied with a Court's construction of a particular instrument.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

August 28, 1953.

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*New England Trust Company *v.* Paine, 317 Mass. 542, 550-1, 59 N. E. 2d 263 (1945); North Adams National Bank *v.* Curtiss, 278 Mass. 471, 476-8, 180 N. E. 217 (1932).